

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MAURICIO R. MUNOZ,

Petitioner,

No. CIV S-04-1658 LKK EFB P

vs.

KEN CLARK, Warden,

FINDINGS AND RECOMMENDATIONS

Respondent.¹

Petitioner is a state prisoner without counsel seeking a writ of habeas corpus. *See* 28 U.S.C. § 2254. This action proceeds on his April 20, 2007, amended petition. Currently before the court is respondent's motion to dismiss on the ground that the petition is untimely. For the reasons explained below, the court finds that the amended petition is untimely and that the motion must be granted.

I. Procedural History

Petitioner was convicted of sex offenses and placed on probation. Pet., at 1. One condition of his probation was that he satisfactorily complete a sex-offender counseling program.

¹ Ken Clark replaced John Marshall as the warden at the California Substance Abuse Treatment Facility and State Prison, where petitioner is housed. Accordingly, Warden Clark is substituted in place of John Marshall as the respondent in this matter. *See* Fed. R. Civ. P. 25(d).

1 Resp.'s Mot. to Dism., Docs. Lodged in Supp. Thereof ("Lod. Doc.") 1, at 1-2. On April 11,
2 2003, the Yuba County Superior Court found that plaintiff failed to comply with this condition,
3 and issued an order revoking petitioner's parole, imposing a 12-year prison term for the
4 underlying conviction. Pet'r's Opp'n, at 61-64. On August 3, 2003, plaintiff appealed. Lod.
5 Doc. 1. The appellate court affirmed the judgment on March 5, 2004. Lod. Doc. 4. On April 6,
6 2004, petitioner sought review in the California Supreme Court. Lod. Doc. 5. He contended that
7 the testimony of a witness named Dennis Bruce was based solely on a desire to retaliate against
8 petitioner for suggesting that Bruce could be a sex offender. Petitioner claimed that Bruce's
9 testimony was given immediately following the development of a personal conflict between the
10 two and was insufficient to justify revoking petitioner's parole. Lod. Doc. 5. On May 17, 2004,
11 the California Supreme Court denied the petition for review. Lod. Doc. 6.

12 Petitioner filed his initial petition in this court on August 23, 2005. He alleged the
13 following grounds for relief: (1) that revoking his probation was unfair because it was based
14 upon biased testimony by the sex-offender program director, Dennis Bruce, who thought
15 petitioner had not shown adequate remorse and who accused petitioner's family of lying to cover
16 up petitioner's offenses; (2) that revocation was unfair because Dennis Bruce's testimony
17 amounted to retaliation against petitioner for petitioner's stating that for all he knew, Bruce
18 could be a sex offender; (3) that the court unfairly disregarded evidence of Bruce's bias,
19 including testimony that accusing petitioner's family of lying was a way of encouraging
20 petitioner not to minimize his offenses; and (4) that the sentencing court failed to consider that
21 petitioner sought therapy from a different counselor but was refused because he did not have the
22 court's permission. Respondent moved to dismiss that petition on the ground that petitioner
23 failed to exhaust available state remedies. On July 12, 2005, this court found that petitioner did
24 not exhaust his claims that Dennis Bruce's testimony was motivated by bias or that the trial court
25 failed to consider relevant facts when it imposed sentence. The court gave petitioner 60 days to
26 file a motion to stay this action and hold it in abeyance while he exhausted these claims. *See*

1 July 12, 2005, Order. The court also informed petitioner that if he failed to seek stay and
2 abeyance, respondent's motion would be granted.

3 On July 15, 2005, petitioner filed petition a for a writ of habeas corpus in the Yuba
4 County Superior Court. Lod. Doc. 7. That petition was dismissed without prejudice on August
5 31, 2005 because petitioner did not complete a standard form petition, and thus failed to provide
6 "information the Court requires to rule upon the Petition." Lod. Doc. 8. Petitioner filed a
7 second petition for a writ of habeas corpus in that court on September 29, 2005, asserting the
8 following claims: (1) his trial counsel was ineffective; (2) his plea was involuntary; (3) petitioner
9 was not competent to proceed at the time of the plea; (3) petitioner's sentence violates state law.
10 Lod. Docs. 7, 9. On November 23, 2005, the trial court denied relief stating, "[t]he Court is
11 convinced that the waiver by the defendant of his rights [admitting the probation violation] was
12 done intelligently, knowingly, and voluntarily and that there was a factual basis for the plea."
13 Lod. Doc. 10.

14 Petitioner delayed, however, in seeking to invoke the stay-abeyance procedure.
15 Therefore, on November 9, 2005, the court ordered him to file a motion to stay this action, and
16 warned him that if he did not do so the court would strike the unexhausted claims and allow the
17 action to proceed on the exhausted claims only. Thus, on December 22, 2005, petitioner moved
18 to have these proceedings stayed and held in abeyance while he presented his unexhausted
19 claims to the state courts. On March 1, 2006, this court granted petitioner's motion to stay this
20 action and hold it in abeyance.

21 On June 30, 2006, petitioner filed a habeas petition in the state appellate court. Lod.
22 Doc. 11. As grounds for relief, petitioner alleged the following: (1) trial counsel was ineffective
23 by failing to investigate, to move to suppress inculpatory evidence, and failing to communicate
24 information necessary for petitioner intelligently to decide whether to enter a plea of guilty; (2)
25 trial counsel's ineffectiveness resulted in petitioner entering a plea of guilty that was not
26 voluntary; (3) petitioner's plea of guilty was involuntary because the prosecution lacked

evidence to prove the charges beyond a reasonable doubt; (4) the officer who administered the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 471-75 (1966), lied to petitioner by promising that petitioner's statement would be used only for investigative purposes and not to obtain a conviction; (5) the 12-year sentence imposed upon the violation of his probation violates the plea agreement, which provided for a 6-year prison term; (6) there was insufficient basis for revoking petitioner's probation because the trial judge failed to consider whether there was an appropriate sanction other than imprisonment. Lod. Doc. 11. That court summarily denied relief on July 20, 2006. Lod. Doc. 12. On August 8, 2006, petitioner filed a habeas petition in the California Supreme Court. Lod. Doc. 13. He relied on the same grounds asserted in the petition filed in the appellate court. *Id.* On March 14, 2007, the California Supreme Court summarily denied relief. Lod. Doc. 14.

On April 20, 2007, petitioner filed an amended petition in this court. That petition alleges that: (1) his trial counsel was ineffective; (2) his plea was involuntary; (3) petitioner was not competent to proceed at the time of the plea; and (3) his sentence violates state law.

II. Standards

A one-year limitation period for seeking federal habeas relief begins to run from the latest of the date the judgment became final on direct review, the date on which a state-created impediment to filing is removed, the date the United States Supreme Court makes a new rule retroactively applicable to cases on collateral review or the date on which the factual predicate of a claim could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). The judgment on direct review becomes final when the 90 day limit for filing a petition for certiorari expires. *See Bowen v. Roe*, 188 F.3d 1157 (9th Cir. 1999). A "properly filed" state post conviction application tolls the statute of limitations as long as that application remains "pending." 28 U.S.C. § 2244(d)(2). An application is properly filed when it is delivered to and accepted by a court clerk "in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). Among the rules governing filings with which a

petitioner must comply are those addressing the “form of the document,” independent of whether the claims have merit or might be subject to dismissal pursuant to a procedural defense. *Artuz*, 531 U.S. at 8-9. In California, a properly filed post conviction application is “pending” during the intervals between a lower court decision and filing a new petition in a higher court. *Carey v. Saffold*, 536 U.S. 214, 223 (2002). A federal habeas application does not toll the limitations period under 28 U.S.C. § 2244(d)(2). *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). Petitioner has the burden of showing facts entitling him to statutory tolling. *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002)

III. Analysis

Affording petitioner 90 days from May 17, 2004, when the California Supreme Court denied his petition for review, petitioner’s conviction was final on August 15, 2004. He therefore had until August 10, 2005, to file a federal habeas petition. Thus, as respondent concedes, the initial petition, filed August 9, 2004, was timely.² Instead, respondent makes two arguments. First, the April 20, 2007, amended petition is untimely because petitioner is not entitled to tolling adequate to bring the amended petition within the limitation period. Second, the amended petition does not relate back to the initial petition. Petitioner’s opposition to the motion addresses the merits of his claims rather than the timeliness of his petition. As explained below, the amended petition is untimely.

With respect to tolling, a pending federal habeas petition does not toll the limitation period under 28 U.S.C. § 2244(d)(2). *Duncan*, 531 U.S. at 181-82. Therefore, the fact that petitioner had a timely habeas application pending while he exhausted available state remedies does not, in and of itself, make the amended petition timely. Only petitioner’s applications for state habeas relief can toll the limitations period. Based upon the above dates, petitioner filed his

² Where discernible, the court deems petitioner’s applications filed on the date he delivered them to prison officials to be mailed to the court. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (prisoner’s notice of appeal deemed timely filed on the date it was delivered to prison staff for delivery to the court).

1 initial federal habeas petition one day before the limitation period expired. To avail himself of
 2 statutory tolling, therefore, he must have properly filed a state habeas petition no later than
 3 August 10, 2005, one day after filing the federal petition. Petitioner filed a state habeas petition
 4 on July 15, 2005, nearly one month *before* the limitations period expired. However, it was
 5 dismissed without prejudice because petitioner did not use the correct forms, thus failing to
 6 provide the court with information necessary to know whether it could reach the merits. In other
 7 words, the July 15, 2005, petition was not “properly filed” under 28 U.S.C. § 2244(d)(2); *Artuz* ,
 8 531 U.S. at 8-9. Thus, it did not toll the limitations period. It was not until July 29, 2005, 49
 9 days after the limitations period expired, that petitioner properly filed a habeas petition to the
 10 state court. This state habeas petition provides no basis for tolling under 28 U.S.C. § 2244(d)(2)
 11 because it was filed after the limitation period expired. *See Fergusun v. Palmateer*, 321 F.3d
 12 820, 823 (9th Cir. 2003) (section 2244(d) does not permit re-initiation of the limitation period
 13 when it expires before a timely state petition for post-conviction relief was filed). The rule of
 14 *Saffold* is dependent upon a petitioner having filed the initial state post-conviction motion before
 15 the limitations period expired. Since the limitations period expired before petitioner filed his
 16 initial state post-conviction motion, it does not matter whether he thereafter properly utilized the
 17 state’s post-conviction procedures. Accordingly, petitioner is not entitled to tolling sufficient to
 18 save his amended petition from dismissal as untimely.

19 There remains the question, however, of whether petitioner’s amended petition asserts
 20 claims that relate back to the date of the original pleading. If they do, they are deemed timely.
 21 Fed. R. Civ. P. 15(c)(2). A claim in an amended pleading will be found to relate back if

22 The claim or defense asserted in the amended pleading arose out of the conduct,
 23 transaction or occurrence set forth or attempted to be set forth in the original
 pleading

24 Fed. R. Civ. P.(c)(2). In a habeas action, the original pleading is the initial habeas petition.
 25 *Fayle v. Felix*, 545 U.S. 644, 655 (2005). New claims satisfy Rule 15(c)(2) if they arise from a
 26 “common core of operative facts” as the timely filed claims. *Felix*, 545 U.S. at 664. Otherwise

1 stated, an amended petition “does not relate back . . . when it asserts a new ground for relief
2 supported by facts that are different in both time and type from those the original pleading set
3 forth.” *Id.*, at 650. Having compared the claims in the initial petition and in the amended
4 petition, the court finds that none of the claims in the amended petition relate back to the initial
5 petition. As noted above, petitioner alleged the following in the initial petition: (1) revoking his
6 probation was unfair because it was based upon biased testimony of the sex-offender program
7 director, Dennis Bruce, who thought petitioner had not shown adequate remorse and who
8 accused petitioner’s family of lying to cover up petitioner’s offenses; (2) revocation was unfair
9 because Dennis Bruce’s testimony amounted to retaliation against petitioner for petitioner’s
10 stating that for all he knew, Bruce could be a sex offender; (3) the court unfairly disregarded
11 evidence of Bruce’s bias, including testimony that accusing petitioner’s family of lying was a
12 way of encouraging petitioner not to minimize his offenses; (4) the sentencing court failed to
13 consider that petitioner sought therapy from a different counselor but was refused because he did
14 not have the court’s permission. The amended federal petition alleges that: (1) his trial counsel
15 was ineffective; (2) his plea was involuntary; (3) petitioner was not competent to proceed at the
16 time of the plea; (3) petitioner’s sentence violates state law. Nowhere in the amended federal
17 petition does petitioner mention Dennis Bruce, biased testimony at the revocation hearing, or the
18 question of whether petitioner attempted to seek the therapy that he was required to obtain as a
19 condition of his probation. The new claims simply do not relate back to the claims in the initial
20 petition.

21 **IV. Conclusion**

22 For the reasons explained, petitioner is not entitled to statutory or equitable tolling that
23 would extend the limitation period to July 25, 2005, the date petitioner filed his amended
24 petition. Neither has he included in his amended petition any claims that relate back to the
25 original petition. Therefore, the April 20, 2007, petition is untimely and respondent’s motion to
26 dismiss must be granted.

1 Accordingly, it is hereby RECOMMENDED that respondent's July 18, 2007, motion to
2 dismiss be granted and that this action be dismissed.

3 These findings and recommendations are submitted to the United States District Judge
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
5 after being served with these findings and recommendations, any party may file written
6 objections with the court and serve a copy on all parties. Such a document should be captioned
7 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
8 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
9 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

10 Dated: February 21, 2008.

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12 EDMUND F. BRENNAN
13 UNITED STATES MAGISTRATE JUDGE
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